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IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. 326

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

J. A. C. KENNEDY, Omaha, Nebraska,
GEORGE L. DELACY, Omaha, Nebraska,
LEO EISENSTATT, Omaha, Nebraska,
DONALD LEACH, Columbus, Ohio,
KENNEDY, HOLLAND, DELACY & SVOBODA,
Omaha, Nebraska,
Attorneys for Petitioner.

Law Briefs — OMAHA LINO-SLUG PRINTING CO. — 418 So. 13th St.

INDEX

	Page
Jurisdiction	2
Opinions Below	2
Summary and Short Statement of the Matter Involved	2
Questions Presented	12
Specification of Errors To Be Urged	16
Statute Involved	20
Reasons Relied on for Granting the Writ	21
1. The decision of the Court of Appeals is in conflict with the decision of other Courts of Appeals on the questions set out in Questions Presented, numbered as follows: 1, 2, 5, 6, 7, 9, 10	21
2. The Court below decided important questions of Federal Law in interpretation of Fair Labor Standards Act of 1938 as effected by Portal-to-Portal Act of 1947, which have not been but should be settled by this Court	21
3. The Court of Appeals decided a Federal question of law in conflict with the applicable decisions of this Court	21
4. The Court below affirmed a finding of fact of the Lower Court to the effect that during the lunch periods involved the guards were engaged in the principal activity of the work-week and were not merely taking care of preliminary or postliminary matters, which said finding of fact was clearly erroneous	21
5. The Court below affirmed a finding of fact of the Lower Court to the effect that during the lunch periods involved the firemen were engaged in the principal activity of the work-week and were not merely taking care of preliminary or postliminary matters, which said finding of fact was clearly erroneous	21
6. Under the evidence the Court of Appeals should have held that the District Court erred in not applying the rule of "De Minimus Non Curat Lex"	21
Appendix	22

INDEX—Continued

Page

Brief in Support of Petition for Writ of Certiorari

Reason Number 1 Relied Upon for Granting Writ of Certiorari:

The Decision of the Court of Appeals Is in Conflict with the Decision of Other Courts of Appeals on the Questions Set Out in Questions Presented, Numbered as Follows: 1, 2, 5, 6, 7, 9 and 10 Included in Petition for Writ of Certiorari 28

Reason Number 2 Relied Upon for Granting Writ of Certiorari. The Reason Is as Follows:

"The Court Below Decided Important Questions of Federal Law, i. e., an Interpretation of the Fair Labor Standards Act of 1938 and an Interpretation of the Portal-to-Portal Act of 1947 with Reference Thereto Which Have Not Been But Should Be Settled by This Court" 46

Reason Number 3 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

"The Court of Appeals Decided a Federal Question of Law in Conflict with the Applicable Decision of This Court" 52

Reason Number 4 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

"The Court Below Affirmed a Finding of Fact of the Lower Court to the Effect That During the Lunch Periods Involved the Guards Were Engaged in the Principal Activity of the Work-Week and Were Not Merely Taking Care of Preliminary or Postliminary Matters, Which Said Finding of Fact Was Clearly Erroneous.... 53

Evidence Produced by Plaintiffs 56

—Plaintiffs' Witness Wren L. Culkin 56

—William A. Keefer 57

—Alex Feilmeyer 58

—Lewis Allerton 59

—Angeline E. Way 59

—John Kerwin 60

—Carl A. Carsey 61

INDEX—Continued

Page

Reason Number 5 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

"The Court Below Affirmed a Finding of Fact of the Lower Court to the Effect That During the Lunch Periods Involved the Firemen were Engaged in the Principal Activity of the Work-Week and Were Not Merely Taking Care of Preliminary or Postliminary Matters, Which Said Finding of Fact Was Clearly Erroneous".... 64

Reason Number 6 Relied Upon for Granting of Writ of Certiorari. The Reason Is as Follows:

"Under the Evidence the Court of Appeals Should Have Held That the District Court Erred in Not Applying the Rule of 'De Minimus Non Curat Lex"..... 65

Conclusion 67

Cases Cited

Armour and Company v. Wantock, 323 U. S. 126, 65 S. Ct. 165.... 52

Battaglia v. General Motors Corporation, 169 Fed. (2d) 569 .....16, 32, 37, 38, 51

Bauler v. Pressed Steel Car Company, 81 Fed. Supp. 172, affirmed 7th Cir., 182 Fed. (2d) 357..... 16

Boerkoel v. Hayes Manufacturing Company, 76 Fed. Supp. 174... 16, 33

Central Missouri Telephone Company, Eighth Circuit, 170 Fed. (2d) 641 .....12, 13, 16

Cobb v. Aluminum Co. of America, 226 S. W. (2d) 110..... 42

Jax Beer Co. v. Redfern (5th Circuit), 124 Fed. (2d) 172..... 66

Kemp v. Day & Zimmerman, Supreme Court of Iowa, 33 N. W. (2d) 569 16

Love v. United States Rubber Company (U. S. D. C., Pa.), 92 Fed. Supp. 174 ..... 16, 36

Redwitz v. Ford Motor Co. (U. S. D. C., Western District of Kentucky), 80 Fed. Supp. 265..... 38

Rokey v. Day & Zimmerman, 157 Fed. (2d) 734 (Eighth Circuit) 53

Seese v. Bethlehem Steel Company, 4th Cir., 74 Fed. Supp. 412, affirmed 168 Fed. (2d) 58.....16, 36, 38

Skidmore v. Swift and Company, 323 U. S. 134, 65 S. Ct. 161..... 52

INDEX—Continued

Page

Tipton v. Bearl Sprott Co. (U. S. C. A., Ninth Circuit), 175 Fed. (2d) 432 37

United States Cartridge Company v. Powell, 185 Fed. (2d) 67.... 31

Welsh v. W. J. Dillner Transfer Co. (D. C., W. D., Pa.), 91 F. Supp. 685 34

Williams v. Jacksonville Terminal Co., 1942, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914.....48, 52, 53

Statutes and Miscellaneous

3 A. L. R. (2d) 1129..... 38

21 A. L. R. (2d) 1337..... 41

Fair Labor Standards Act of 1938, 29 U. S. C., Sec. 201, et seq.:
- Section 16b 3
- Section 16 .....12, 13, 16
- Section 7 35

Portal-to-Portal Act of 1947, 29 U. S. C. A., Sec. 251, et seq.:
- Section 2 .....12, 13, 34, 35
- Section 2, Part II, sub-sections 1 or 2 of sub-section (a) 14, 17, 18, 31, 33, 37
- Section 2, Section (d), Part II..... 15, 48
- Section 251 23
- Section 252 23
- Section 253 24
- Section 254 24
- Section 255 26
- Section 256 26
- Section 257 26
- Section 258 27
- Section 259 27
- Section 260 27
- Section 261 27
- Section 262 27
- Section 2, Part II..... 36, 47
- Section 4, Part III..... 48

Title 28, U. S. C., Sec. 1254 (1)..... 2

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No. ———

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WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

To the Honorable the Chief Justice and the Associate Justices of the United States:

Your Petitioner, The Glenn L. Martin Nebraska Company, a corporation, respectfully prays that a writ of certiorari be issued out of and under the seal of this Court to review the decision of the United States Court of Appeals for the Eighth Circuit rendered on the 24th day of June, 1952, which by a divided Court affirmed a

judgment of the United States District Court for the District of Nebraska, Omaha Division, finding in favor of the Appellees, and in entering judgment in favor of the Appellees in the total sum of $60,980.14, constituting unpaid wages and overtime found to be due Appellees from Appellant under the Fair Labor Standards Act, as amended, together with liquidated damages in the sum of $30,490.07, or a total of $91,470.21, together with the allowance of an attorney's fee in the sum of $15,000.00, all to draw interest at 6% from the 17th day of July, 1951. Appellant's Petition for Rehearing filed in Court of Appeals was denied August 15, 1952.

JURISDICTION

Jurisdiction to review this case upon writ of certiorari is conferred upon this Court by 28 U. S. C. 1254 (1). The opinion of the Court of Appeals for the Eighth Circuit was filed June 24, 1952. Petition for Rehearing was overruled August 15, 1952. Upon application of the Appellant an order was entered staying the issuance of the mandate until the 21st day of September, 1952, pending the filing of this Petition for Certiorari.

OPINIONS BELOW

The opinion of the District Court is reported in 97 Fed. Supp. 661, and is also printed in the Record (R. 54 to 72). The majority opinion of the Court of Appeals and the dissenting opinion of Judge Riddick appears in — Fed. (2d) —, and also printed in the Record (R. 5).

SUMMARY AND SHORT STATEMENT OF THE MATTER INVOLVED

Respondents, *Wren L. Culkin, Glen West, Francis H. Masker* and *Alex Feilmeyer*, individually and as agents

and representatives to maintain an action for and on behalf of all employees similarly situated, instituted this action against your Petitioner for the recovery of alleged unpaid overtime compensation and liquidated damages, and, in addition thereto, attorney's fees and costs under Section 16(b) of the Fair Labor Standards Act of 1938 (29 U. S. C. 216 (b)).

The Respondents, and the 254 employees represented by Respondents, were employed as guards or firemen at the Petitioner's plant. The Petitioner operated The Glenn L. Martin Nebraska Company plant near Omaha, Nebraska, during World War II. The United States Government erected an airplane assembly and modification plant on a military reservation, known as Fort Crook, Nebraska, some miles out from Omaha, Nebraska. The plant covered some 700 acres and was fenced and guarded. The Government entered into contracts with The Glenn L. Martin Nebraska Company for the modification of and the production of airplanes. To carry out these contracts, some 13,000 or 14,000 persons were employed at the plant.

The plant operated on a 24-hour a day schedule. Until March 6, 1943, the guards and firemen worked on three shifts. The first shift checked in not later than seven and checked out not earlier than three p. m The other two shifts covered the remainder of the time. *The guards were required to eat their lunch at their posts, and were not allowed to leave their posts.*

The Petitioner had constructed in the various buildings on the plant area four or five very excellent cafeterias.

On March 3, 1943, an order was issued by Petitioner, effective March 6, 1943, which was as follows:

> "Effective Saturday, March 6, the Guards on the first shift will ring in by 6:45 A. M. and ring out after 3:15 P. M. This will mean that the Guards will have 8½ hours on the clock. This should be ample time to get your uniforms changed and receive orders and be on the post at 7:00 A. M.
>
> "Guards will not be allowed to eat on their posts. They will be allowed thirty (30) minutes for lunch. The Rover in this case when on relief will check the Guard out and in during the lunch period. The Guards will be allowed to eat in the Cafeteria during the lunch period.
>
> "The Guards on the second shift will ring in by 2:45 P. M. and ring out after 11:15 P. M. and will follow the instructions as given in the first paragraph, and the second paragraph.
>
> "The Guards on the third shift will ring in by 10:45 P. M. and ring out after 7:15 A. M. and will follow the instructions as given in the first paragraph, and the second paragraph.
>
> "That pertains to all three Companies."

The guards on the first shift, while they rang in at 6:45, did not have to be at their post until seven, and while they rang out at three fifteen, they did not have to be at their post later than three. They were paid for eight hours. The other shifts were arranged accordingly.

The Timekeeping Department was directed to, and did deduct, the thirty minute lunch period from working time. The Lower Court found as a finding of fact that the employees knew that they were not to be paid for the thirty minute lunch period.

The undisputed evidence shows that in accordance with the bulletin of March 6th, your Petitioner each morning posted *bulletins assigning the various guards to the various posts, assigning their lunch period and setting forth by whom they were to be relieved.* Some of the posts could not be left vacant, so rovers or relief men were provided to relieve the guards at these posts.

The undisputed evidence shows that this was done. If the guards were at a distant post, rovers in jeeps or on bicycles relieved them, and the guard took the jeep or the bicycle and rode to the cafeteria and back.

At some of the posts there were several guards stationed and these guards relieved each other for their lunch periods; if they were close enough to the cafeteria, they walked to it. If not, they were transported to the cafeterias in company jeeps.

The undisputed evidence shows that this plan was put in effect; that the daily bulletins were posted assigning the guards and firemen to their posts, assigning the lunch hours of the guards, and listing in the bulletin by whom they would be relieved.

The Petitioner maintained, as has been said before, large and excellent cafeterias, and these guards could either eat at the cafeteria or could go to their locker rooms or could be at ease or could go to what is called the smoking area.

An attempt was made to show that during the lunch period, on one or two occasions in some eighteen months, one or two of the guards were called away from lunch or their lunch was interrupted. On cross-examination it de-

veloped that only two or three of the guards were called away from any lunch period, during the period from March 6, 1943, to September 17, 1944 (the period involved), and if they were, they were allowed to return and have their lunch at a later period.

The undisputed evidence likewise shows that not any guard was called away more than two or three times, or a few times during the period from March 6, 1943, to September 17, 1944. At this latter date, another bulletin was posted, which changed the hours of the guards and firemen again, and which required the guards and firemen to eat their lunch at their posts and deprived them of the right of eating in the cafeteria. Not more than twelve guards and firemen were called to testify. These testified generally. They, however, did not pretend to give evidence of the actual time consumed by their activities during any lunch period, nor did they presume to give any evidence as to the actual activities of the approximately 250 claimants who did not appear.

We believe that Circuit Judge Riddick's statement of the matter involved is so accurate and to the point, that we will quote it from the dissenting opinion:

> "Plaintiffs were employed as guards or firemen at defendant's plant. Their employment was subject to the approval of the United States. They were required to bear arms and wear identifying uniforms furnished them while within the plant.
>
> "From January 1, 1942, until March 6, 1943, plaintiffs were employed and paid for an eight-hour day. During this period plaintiffs were required to spend one-half hour or more each day, in addition to their regular eight-hour work day, in reporting for duty, answering roll call, changing from their civilian

clothes to their uniforms, and in receiving arms and other equipment before reporting to their posts of duty, and at the conclusion of their eight-hour work day in changing from their uniforms to their civilian clothes and turning in their equipment. For this time in excess of their eight hours of work they were not paid, and payment was not required either by an express provision of their contract of employment or by any custom or practice existing at defendant's plant. During this period plaintiffs were allowed no time off for lunch. They were permitted to bring their lunches and eat while at their posts of duty as and when their work permitted.

"After March 6, 1943, and until September 17, 1944, the work hours of plaintiffs were changed. What brought about the change the evidence does not reveal, but under it the plaintiffs were still employed for an eight-hour work day which began fifteen minutes before they reached the posts to which they were assigned and ended fifteen minutes after leaving their posts. For this half hour which plaintiffs spent in reporting for duty, in changing from civilian to official clothes, and in receiving equipment before going to their posts and in changing from official to civilian clothes and turning in equipment after leaving their posts, the plaintiffs were paid. But during this period plaintiffs were allowed thirty minutes off each day for lunch for which they received no compensation and for which no express provision of their contract of employment or any custom or practice existing at defendant's plant required payment. During the thirty minutes allowed for lunch plaintiffs were permitted to eat at defendant's cafeterias, or, if they preferred, to bring their own lunches and to eat wherever they wished during the lunch period allowed them.

"Beginning on September 17, 1944, the hours of work for plaintiffs were again changed. From the date mentioned until the termination of operations at defendant's plant the thirty minutes allowance of time

off for lunch was abolished and plaintiffs were paid for eight and one-half hours each day. During this period plaintiffs were required, if they ate lunch, to bring it with them and eat at their posts of duty.

"The first complaint in this action was filed on January 11, 1945, by four plaintiffs on behalf of themselves and as representatives of 109 similarly-situated employees. On March 2, 1945, the same plaintiffs filed an amendment to the complaint on behalf of 117 additional similarly-situated employees. And on November 5, 1946, the second amended complaint added 48 employees. The claim stated in these complaints was for the recovery of alleged unpaid overtime compensation and liquidated damages and, in addition, attorney's fees and costs. Each of these complaints charged that plaintiffs were employed by defendant in three separate shifts of eight hours each until September 1944, and thereafter in three shifts of eight and one-half hours each, for which they were paid. Unpaid overtime compensation was claimed throughout the period of employment for time occupied by plaintiffs in reporting for duty, changing uniforms, and receiving equipment before the beginning of their respective shifts, and in changing from uniforms to civilian clothes and turning in equipment at the conclusion of their respective shifts; and for the thirty minutes each day allowed for lunch in the period beginning March 6, 1943, and ending September 16, 1944.

"The Portal-to-Portal Act of 1947 became effective May 14, 1947. On June 7, 1947, the defendant moved to dismiss the action 'for the reason that the jurisdiction of the alleged cause of action * * * is divested this Court by Section 2(d) of the Portal-to-Portal Act of 1947, for the reason that the activities set forth in the Complaint and Amendments thereof filed herein are not compensable activities as defined in Sections 2(a) and (b) of the Portal-to-Portal Act of 1947.'

"In response to this motion plaintiffs filed a supplemental pleading changing their claim for relief. In this pleading they alleged that they were employed for a work day of eight and one-half hours instead of eight hours throughout the time of their employment. They denied that they claimed 'or ever have claimed' payment for the time spent by them immediately prior to or immediately subsequent to the eight and one-half hour shift; that throughout the entire period of employment plaintiffs were entitled to compensation for the entire period of eight and one-half hours 'under the universal custom and practice in effect at said time, and for many years prior thereto * * *' and 'under the general non-written contract of employment in effect between Defendant and each of said employees.' The prayer of this pleading was that the motion to dismiss be denied and that plaintiffs have judgment 'as prayed in their said original Complaint and First and Second Amendments thereto.'

"The District Court reserved decision on the motion to dismiss until the trial on the merits, and granted defendant time in which to plead further. In its answer defendant denied the material allegations of plaintiffs' various pleadings, set up numerous defenses no longer important in the case because abandoned by defendant or overruled by decisions of the Supreme Court before the case came to trial, and repeated by way of defense the provisions of the Portal-to-Portal Act of 1947 relied on in its motion to dismiss.

"Both parties amended their pleadings by leave of court during the course of the trial. Plaintiffs' amendment alleged:

" 'That it was the custom and practice generally of the above named defendant at the premises of said defendant aforesaid and where each and all of

said plaintiffs were employed throughout the entire period involved in this action and particularly throughout the years 1943 and 1944, to pay its employees on the basis of time and one-half for all hours of actual working time of each such employee in excess of 40 hours in any one work week; and that all such actual working time was compensable under said custom and practice. That, however, defendant particularly throughout the period of March 6, 1943, to September 16, 1944, wrongfully declined and refused to consider the activities of these plaintiffs during their alleged one-half hour lunch period as being actual working time. * * *"

"Defendant's amendments to its pleadings alleged as true the facts set out at the beginning of this opinion, denied the existence of a contract, written or non-written, or a practice or custom requiring payments to plaintiffs other than those made, and alleged that its conduct in not paying the plaintiffs compensation for the thirty-minute lunch period between March 6, 1943, and September 17, 1944, or for any activities performed during said period was in good faith, and that the defendant had reasonable grounds for belief that its omission so to do was not in violation of the Fair Labor Standards Act of 1938, as amended.

"At the beginning of the trial plaintiffs abandoned all claims for unpaid compensation except for the thirty-minute lunch period allowed them between March 6, 1943, and September 17, 1944. The real question at issue was whether the thirty-minute lunch period was compensable working time in view of the provisions of the Portal-to-Portal Act of 1947 relied on by the defendant. On this issue the court found that the thirty-minute period was not compensable by an express provision of the contract of employment, and that the allegations of a practice or custom for compensation for this period in plaintiffs' pleadings were insufficient to raise the issue. The trial

Court also found that the defendant adopted the arrangement for a thirty-minute lunch period in good faith and with reasonable grounds for belief that it was not in violation of the Fair Labor Standards Act, as amended. But the trial court concluded that although the lunch period was not compensable working time by contract or custom or practice, it was, nevertheless, compensable working time because plaintiffs during the thirty-minute period were subject to call to active duty in case of emergency, and because during the lunch period plaintiffs were required to wear their uniforms including their caps, and to bear their sidearms or portable telephone as required while on active duty.

* * *

"The evidence on which the court reached the conclusion stated in its opinion came from only twelve of the more than 250 plaintiffs. None who testified could remember a specific instance of a call to active duty during his lunch period. All admitted that unless called to duty they had an uninterrupted thirty minutes for lunch. All admitted that if the lunch period was temporarily interrupted by a call to duty the employee could return to lunch at a later period. Only one witness testified that he was always on duty throughout the lunch period. His testimony was contradicted by the evidence on behalf of the defendant supported by defendant's timekeeping records."

The original action was not a true class action, but a consolidation for trial of more than 254 separate claims. The action was not one to recover for time spent on calls to duty during an alleged lunch period. The claims were for compensation for the entire lunch period even though the claimants spent their entire lunch time eating their lunch in the cafeteria, or in the locker room at ease, or in the smoking area at ease. The case was brought on be-

half of approximately 250 claimants by four plaintiffs. The Judgment entered appears on page 78 of the printed Record and in a flat judgment in favor of the four plaintiffs for $60,980.14 plus $30,490.07 liquidated damages, or a total of $91,470.21. This sum the Court found due the individual employee plaintiffs in the respective sums set opposite their names in the detailed list attached to the Judgment.

The Lower Court also allowed the plaintiffs' attorney $15,000.00. The Judgment was affirmed by the United States Court of Appeals by a two to one decision. The Judges Johnsen and Collet were for an affirmance, and Judge Riddick dissented, and filed a dissenting opinion. The majority were of the opinion that the case was controlled by the opinion in *Central Missouri Telephone Company, Eighth Circuit,* 170 Fed. (2d) 641.

The Court of Appeals affirmed the decision of the Lower Court to the effect that Section 2 of the Portal-to-Portal Act was not applicable, and held that the plaintiffs were not required to plead a contract or a custom in order to recover for the entire thirty minute lunch period involved between March 6, 1943, and September 17, 1944.

QUESTIONS PRESENTED

The questions presented by this Petition are—

1. Whether in a suit, under Section 16 of the Fair Labor Standards Act of 1938, as amended, brought by four employees on behalf of themselves and on behalf of some 250 other employees, i. e., guards and a few firemen employed at The Glenn L. Martin Nebraska Plant engaged in manufacturing and modifying of airplanes for the United States Government during the last war, to re-

cover overtime for the thirty minute lunch period which was allowed them and provided for them, and in which period the guards were allowed to go to the cafeteria to eat or were allowed to go to the locker room or the smoking area, and concerning which it was understood and known by everybody that said employees were not to be paid for the lunch period, can recover compensation and overtime for the lunch period *without alleging and showing that within the meaning of Section 2 of the Portal-to-Portal Act*, 29 U. S. C. A., Sections 251 to 262, *there was either a contract or a custom to pay for such period.*

2. Whether the holding as a matter of law by the District Court and the Court of Appeals for the Eighth Circuit that because the activities involved claimed to have taken place during the allowed thirty minute lunch period were not strictly speaking preliminary or postliminary activities, that Section 2 of the Portal-to-Portal Act of 1947 does not apply, the case being brought for overtime compensation and liquidated damages, under Section 16 of the Fair Labor Standards Act of 1938, as amended.

3. Whether the facts in *Central Missouri Telephone Company vs. Conwell*, Eighth Circuit, 170 Fed. (2d) 641, make this case decisive as an authority in the case at bar.

4. Whether the decision in *Central Missouri Telephone Company vs. Conwell*, Eighth Circuit, 170 Fed. (2d) 641, is correct or should be overruled.

5. Whether in a case where guards and firemen were specifically allowed a thirty minute lunch period and where there was a bulletin published to that effect and where the Company each morning posted a bulletin desig-

nating the various posts to which the guards were assigned, designating their lunch periods, and designating by whom they were to be relieved, and when the undisputed evidence shows that they were relieved and were allowed to go to the cafeteria during their lunch period and were allowed to go to the smoking area, or to their locker room, and where, in addition thereto, the evidence shows that guards at certain posts were relieved by rovers, and where the evidence shows that guards at distant posts were brought to the cafeterias by jeeps and where it is admitted by all that all of the claimants knew of the bulletin, knew of the plan, and knew that they were not to be paid for the thirty minute lunch period provided for by the Petitioner—whether in such case such guards and firemen bringing a suit after the close of the war, and after the close of the Plant to recover overtime for the thirty minute period involved because of the fact that during the lunch period they wore their uniforms and because of the fact that they were not allowed to leave the area, which was over 700 acres in extent, could maintain such a suit under Section 16 of the Fair Labor Standards Act of 1938, as amended, without proving any contract or custom, to pay for such period as required by Section 2 of the Portal-to-Portal Act.

6. Whether the claimed activities on the part of the guards or firemen during their thirty minute lunch period came within the meaning of the term "*any activity of an employee engaged in prior to the date of the enactment of this Act*" so as to require either an express contract or custom, as required by subsections 1 or 2 of subsection (a), Section 2, Part II, of the Portal-to-Portal Act of 1947.

7. Whether the District Court had jurisdiction in view of Section (d), Section 2, Part II of the Portal-to-Portal Act of 1947, which provides—

> "No court of the United States, * * * shall have jurisdiction in any action or proceeding, whether instituted prior to or on or after the date of the enactment of this act, to enforce liability * * * on account of the failure of the employer to pay minimum wages on overtime compensation under Fair Labor Standards Act of 1938 as amended * * *, to the extent that such proceeding seeks to enforce any liability * * * with respect to *an* activity which was not compensable within the meaning of sub-sections (a) and (b)" (contract to pay or custom).

8. Whether the holding of the District Court affirmed by Court of Appeals to the effect,—that although the lunch period was not compensable working time by contract or practice, it was nevertheless, compensable working time because plaintiffs during the thirty-minute period were subject to call to active duty in case of emergency and because during the lunch periods plaintiffs were required to wear uniforms, including their caps and to bear their sidearms,—*was not clearly erroneous.*

9. Whether Section 2 of Part II of the Portal-to-Portal Act of 1947, which requires either a contract or custom, is applicable to all activities prior to the passage of the Act, and determines the compensability of all activities during an employee's day rather than being limited to preliminary and postliminary activities.

10. Whether the true rule is that Section 2 of Part II of the Portal-to-Portal Act of 1947 applies to *all* activities, not simply preliminary or postliminary activities, sought to be made the basis of a claim under paragraph

16 of the Fair Labor Standards Act of 1938, as amended, as held in *Seese v. Bethlehem Steel Company,* 4th Cir., 74 Fed. Supp. 412, affirmed 168 Fed. (2d) 58; *Kemp v. Day & Zimmerman,* Supreme Court of Iowa, 33 N. W. (2d) 569; *Battaglia vs. General Motors Corporation,* 169 Fed. (2d) 254, 2d Cir.; *Bauler v. Pressed Steel Car Company,* 81 Fed. Supp. 172, affirmed 7th Cir., 182 Fed. (2d) 357; *Boerkoel v. Hayes Manufacturing Company,* 76 Fed. Supp. 771 (D. C. Western District of Michigan); *Love v. United States Rubber Company* (U. S. D. C., Pa.), 92 Fed. Supp. 174; *Welsh v. Dillner Transfer Company* (D. C., Western Dist. of Pa.), 91 Fed. Supp. 685. This last mentioned case holds weight of authority contra to *Central Missouri Telephone Company v. Conwell,* 8th Cir., 170 Fed. (2d) 641.

11. Whether or not the following finding of fact of the Lower Court, affirmed by the Court of Appeals, was clearly erroneous.

> "The evidence clearly establishes as a matter of fact that during the 'lunch periods' in question, the employees were engaged in the principal activity of the work week and were not merely taking care of preliminary or postliminary matters." (Record, page 72.)

12. Whether the holding of the Court of Appeals to the effect that the "de minimus" rule did not apply was correct.

SPECIFICATION OF ERRORS TO BE URGED

The Court of Appeals erred as follows:

1. In affirming the decision of the Lower Court which held that although the case was one for overtime compen-

sation under Section 16 of the Fair Labor Standards Act of 1938, as amended, plaintiffs were not required to plead or prove a contract or custom to pay for claimed activities during a designated lunch period as required by paragraphs (1) and (2) of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947, 29 U. S. C. A., Sections 251 to 262, and in so holding in its opinion.

2. In allowing plaintiffs in a suit under Section 16 of the Fair Labor Standards Act of 1938, as amended, to recover compensation and overtime compensation for alleged activities claimed to have been performed prior to the passage of the Portal-to-Portal Act of 1947 during thirty minute lunch periods allowed claimants, where the undisputed evidence and findings of the Lower Court disclosed no contract or custom to pay for such activities as required by Section 2 of Part II of the Portal-to-Portal Act of 1947.

3. The Court of Appeals erred in sustaining the decision of the District Court to the effect that Section 2 of Part II of the Portal-to-Portal Act of 1947 was not applicable, and that plaintiffs were not required to prove a contract or custom as required by said Portal-to-Portal Act, i. e., paragraphs (1) and (2), sub-section (a) of Section 2 of Part II of said Act.

4. Under the same facts as set forth in Assignment of Error 2, the Court of Appeals erred in affirming the decision of the Lower Court to the effect that the Court had jurisdiction to try said case and to enter judgment for plaintiffs, notwithstanding sub-section (d) of Section 2 of Part II of the Portal-to-Portal Act of 1947.

5. The Lower Court erred and the Court of Appeals erred in affirming the holding that applicability of paragraphs (1) and (2) of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947 depended upon the nature of activities involved and that said sections only applied where activities were, strictly speaking, of a preliminary or postliminary character.

6. The Court of Appeals erred in holding and in affirming decision of Lower Court which so held that the case of *Central Missouri Telephone Company vs. Conwell,* 170 Fed. (2d) 641, was decisive of the case at bar.

7. The Court of Appeals erred in holding and in affirming decision of Lower Court which held that the rule laid down in *Central Missouri Telephone Company v. Conwell,* 170 F. (2d) 641, was the correct law and in not following the majority view of the country, which is to the contrary.

8. Where undisputed evidence shows that guards were required to do certain specified work at their posts, such as inspecting cars, checking freight cars, checking identification of persons entering the Plant, and where evidence shows guards were allowed after March 6, 1943, until September 17, 1947, a thirty minute lunch period without pay and were assigned by daily bulletin to their respective posts, and were assigned by the same bulletin their exact lunch periods and by whom they were to be relieved when necessary by guards or rovers, and where some of them were transported to cafeterias in jeeps or allowed to use bicycles to go to cafeterias, said guards being relieved by rovers, a finding that said guards were engaged in their regular activities because while eating in the cafeterias or at ease in the smoking area, they were

required to remain within the 700 acre plant area and were required to wear their uniform and guns, or because they might be called in case of an emergency, or because during the period of the eighteen months involved on one or two occasions the lunch period of a few guards was disturbed, they being allowed to eat their lunch at a later period, is clearly erroneous, and the Court of Appeals erred in affirming the decision of the Lower Court, which so held.

9. Where the undisputed evidence shows the firemen involved during the period involved were by bulletin in the morning assigned to various stations, i. e., inspection in the various buildings or crash truck, and where three or four of them were assigned to the fire house and where the undisputed evidence shows that the firemen inspecting in the various buildings were allowed a thirty minute lunch period, and were allowed to eat in the cafeterias, and where the undisputed evidence shows that the firemen who remained in the fire hall were allowed a thirty minute lunch period and were allowed to go to the cafeteria, and get their lunch, and were allowed to eat it at a table provided for that purpose in the fire hall, and where the evidence discloses that if their lunch period was ever disturbed they were allowed a lunch period at another time, and where the evidence shows that there was a cafeteria within a few steps of the fire hall, the finding of the Lower Court affirmed by the Court of Appeals to the effect that during this allowed lunch period the firemen were performing their regular activities, is clearly erroneous.

10. The Court of Appeals erred in affirming the following finding of the Lower Court:

> "the evidence clearly establishes as a matter of fact that during the 'lunch periods' in question, the employees were engaged in the principal activity of the work week and were not merely taking care of preliminary or postliminary matters."

and in finding that the thirty minute lunch period constituted hours worked within the meaning of the Fair Labor Standards Act, was clearly erroneous as to 1) guards; 2) firemen.

11. The Court of Appeals erred in deciding as a matter of law that Section 2 of Part II of the Portal-to-Portal Act did not apply, holding this as to 1) guards; 2) firemen.

12. The Court of Appeals erred in affirming the allowance of liquidated damages by the Lower Court.

13. The Court of Appeals erred in affirming the judgment of the District Court in—

(a) Allowing judgment in favor of plaintiffs in the sum of $60,980.14;

(b) Allowing liquidated damages in favor of plaintiffs in the sum of $30,490.07;

(c) Allowing plaintiffs' attorney $15,000.00 as attorney fees.

14. The Court of Appeals erred in holding that the de minimis principle did not apply.

STATUTE INVOLVED

The statute involved is known as the Portal-to-Portal Act, and is Section 29-251 through Section 262, Title 29, United States Code Annotated.

The pertinent sections will be set out in an Appendix attached hereto.

REASONS RELIED ON FOR GRANTING THE WRIT

1. The decision of the Court of Appeals is in conflict with the decision of other Courts of Appeals on the questions set out in Questions Presented, numbered as follows: 1, 2, 5, 6, 7, 9, 10.

2. The Court below decided important questions of Federal law in interpretation of Fair Labor Standards Act of 1938 as effected by Portal-to-Portal Act of 1947, which have not been but should be settled by this Court.

3. The Court of Appeals decided a Federal question of law in conflict with the applicable decisions of this Court.

4. The Court below affirmed a finding of fact of the Lower Court to the effect that during the lunch periods involved the guards were engaged in the principal activity of the work-week and were not merely taking care of preliminary or postliminary matters, which said finding of fact was clearly erroneous.

5. The Court below affirmed a finding of fact of the Lower Court to the effect that during the lunch periods involved the firemen were engaged in the principal activity of the work-week and were not merely taking care of preliminary or postliminary matters, which said finding of fact was clearly erroneous.

6. Under the evidence the Court of Appeals should have held that the District Court erred in not applying the rule of "De Minimus Non Curat Lex."

Note: Argument in support of the foregoing Reasons Relied on for Granting the Writ and in support of the Specification of Errors set forth herein will be presented in a Brief hereto attached.

It is respectfully submitted that there is here presented a proper case for the exercise of the supervisory power of this Court.

Jack Kennedy
George L. O'Hara
Leo Ernst
Don Leach

Counsel for Petitioner

Date: 9/3/52

APPENDIX

Portal-to-Portal Act of 1947, 29 United States Code Annotated, Sections 251 Through 262

Section 251—Congressional Findings and Declaration of Policy:

We will not quote this.

Section 252—Relief from certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act:

This we will quote down to sub-section (e), which is not pertinent.

"(a) No employer shall be subject to any liability or punishment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act (in any action or proceeding commenced prior to or on or after May 14, 1947), on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any activity of an employee engaged in prior to May 14, 1947, except an activity which was compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee was employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(b) For the purpose of subsection (a) of this section, an activity shall be considered as compen-

sable under such contract provision or such custom or practice only when it was engaged in during the portion of the day with respect to which it was so made compensable.

"(c) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employed an employee there shall be counted all that time, but only that time, during which the employee engaged in activities which were compensable within the meaning of subsections (a) and (b) of this section.

"(d) No court of the United States, of any State, Territory, or possession of the United States, or of the District of Columbia, shall have jurisdiction of any action or proceeding, whether instituted prior to or on or after May 14, 1947, to enforce liability or impose punishment for or on account of the failure of the employer to pay minimum wages or overtime compensation under the Fair Labor Standards Act of 1938, as amended, under the Walsh-Healy Act, or under the Bacon-Davis Act, to the extent that such action or proceeding seeks to enforce any liability or impose any punishment with respect to an activity which was not compensable under subsections (a) and (b) of this section."

Section 253—Compromise of certain existing claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act:

This is not set out.

Section 254—Relief from certain future claims under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, and the Bacon-Davis Act:

"(a) Except as provided in subsection (b), no employer shall be subject to any liability or punish-

ment under the Fair Labor Standards Act of 1938, as amended, the Walsh-Healey Act, or the Bacon-Davis Act, on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of any of the following activities of such employee engaged in on or after May 14, 1947—

"(1) walking, riding, or traveling to and from the actual place of performance of the principal activity or activities which such employee is employed to perform, and

"(2) activities which are preliminary to or postliminary to said principal activity or activities, which occur either prior to the time on any particular workday at which such employee commences, or subsequent to the time on any particular workday at which he ceases, such principal activity or activities.

"(b) Notwithstanding the provisions of subsection (a) of this section which relieve an employer from liability and punishment with respect to an activity, the employer shall not be so relieved if such activity is compensable by either—

"(1) an express provision of a written or nonwritten contract in effect, at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer; or

"(2) a custom or practice in effect, at the time of such activity, at the establishment or other place where such employee is employed, covering such activity, not inconsistent with a written or nonwritten contract, in effect at the time of such activity, between such employee, his agent, or collective-bargaining representative and his employer.

"(c) For the purposes of subsection (b) of this section, an activity shall be considered as compensable under such contract provision or such custom or practice only when it is engaged in during the portion

of the day with respect to which it is so made compensable.

"(d) In the application of the minimum wage and overtime compensation provisions of the Fair Labor Standards Act of 1938, as amended, of the Walsh-Healey Act, or of the Bacon-Davis Act, in determining the time for which an employer employs an employee with respect to walking, riding, traveling, or other preliminary or postliminary activities described in subsection (a) of this section, there shall be counted all that time, but only that time, during which the employee engages in any such activity which is compensable within the meaning of subsections (b) and (c) of this section."

Section 255—Statute of Limitations:

This is not quoted.

Section 256—Determination of commencement of future actions:

This is not quoted.

Section 257—Pending collective and representative actions:

"The statute of limitations prescribed in section 255(b) of this title shall also be applicable (in the case of a collective or representative action commenced prior to May 14, 1947, under the Fair Labor Standards Act of 1938, as amended) to an individual claimant who has not been specifically named as a party plaintiff to the action prior to the expiration of one hundred and twenty days after May 14, 1947. In the application of such statute of limitations such action shall be considered to have been commenced as to him when, and only when, his written consent to become a party plaintiff to the action is filed in the court in which the action was brought."

Section 258—Reliance on past administrative rulings, etc.

This is not quoted.

Section 259—Reliance in future on administrative Rulings, etc.:

This is not quoted.

Section 260—Liquidated damages:

"In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the Court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in Section 216 (b) of this title."

Section 261—Applicability of 'area of production' regulations:

This is not quoted.

Section 262—Definitions:

This is not quoted.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1952

No. ———

THE GLENN L. MARTIN NEBRASKA COMPANY, a Corporation,

Petitioner,

vs.

WREN L. CULKIN, GLEN WEST, FRANCIS H. MASKER, and ALEX FEILMEYER, Individually and as Agents and Representatives to Maintain This Action for and in Behalf of All Employees Similarly Situated,

Respondents.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

Reason Number 1 Relied Upon for Granting Writ of Certiorari:

The Decision of the Court of Appeals Is in Conflict with the Decision of Other Courts of Appeals on the Questions Set Out in Questions Presented, Numbered as Follows: 1, 2, 5, 6, 7, 9 and 10 Included in Petition for Writ of Certiorari.

The Court of Appeals affirmed the Lower Court's decision which held—

> "whether the time is Portal-to-Portal time depends on the nature of the activity engaged in during the period in question and not upon the term by which the period is known. * * * The evidence in this case clearly establishes as a matter of fact that during the lunch periods in question, the employees were engaged in the principal activity of the workweek and were not merely taking care of preliminary or postliminary matters. This being so, the court has concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period."

The Court of Appeals likewise held that the case falls within the class with the *Central Missouri Telephone Company* case, 170 Fed. (2d) 641, and held that the Portal-to-Portal Act did not apply to the case.

We refer to the Summary and Short Statement of the Matter Involved, and we especially refer to the dissenting opinion of Judge Riddick.

The plaintiffs were allowed a thirty minute lunch period. All but a few of the plaintiffs were guards. Guards and Firemen are identified by the letters "G" and "F" in the list attached to the Judgment. There were only a few firemen, relatively speaking.

The undisputed evidence shows that the defendant, by bulletin, granted to the guards a thirty minute lunch period without pay, granting them the right to go to and eat in the cafeterias, and the defendant provided the necessary reliefs in order to enable the guards to go to

the cafeterias. They could either go to the cafeterias or to a smoking area, or to rest rooms. It is claimed that because the guards wore their uniforms and equipment and because they were not allowed to leave the plant area, which was more than 700 acres, that they should have been paid for this lunch period notwithstanding that they knew they were not to be paid for it, and notwithstanding that they were allowed a lunch period. There never was but one emergency, but the claim was made that the guards were subject to be called in the event there was an emergency, and an attempt was made to prove that their lunch periods were on occasions interrupted. However, the proof fell down in this respect. The proof in this regard is as set forth in Judge Riddick's opinion. Only on the rarest occasions, i. e., one or two times in eighteen months was the lunch period of the guards or any of them disturbed, and if the lunch periods were disturbed, they were allowed to eat their lunch at a later time. No attempt was made to prove any actual time consumed during this thirty minute period by guards or firemen. Only twelve witnesses were called. There was no testimony except general testimony as to the activities of the other 242 claimants. The case was submitted on the testimony of these 12 claimants. The Lower Court ordered judgment in favor of all the plaintiffs, i. e., 254 in number,—this on the general testimony indicated above.

The Lower Court found that there was no contract to pay the employees for this lunch period. In passing it should be noted that none of the other 10,000 or 12,000 employees were paid for their lunch periods. The Court did not find that there was any custom or practice to pay them within the meaning of the Portal-to-Portal Act, but the Lower Court and the Court of Appeals were of

the opinion that unless an activity was preliminary or postliminary in character, it did not come within the meaning of sub-section (a), Section 2, Part II, of the Portal-to-Portal Act of 1947. This Act was passed after the Fair Labor Standards Act, and, in effect, was an amendment to the earlier Act—both Acts the Court has held must be construed together.

The undisputed evidence shows that guards had specific duties at their various posts, checking cars, trucks, trains, and identifying persons, and so forth. When they went to lunch they left their post, went to a cafeteria, and ate their lunch, and were allowed thirty minutes. Surely no employers having allowed a thirty minute lunch period to his employees would anticipate or expect that several years after the close of his enterprise he would be sued in Court, and be compelled to pay time and a half for these lunch periods.

There were some five cafeterias. All of the employees, machinists, and so forth, were allowed a thirty minute lunch period, and were not paid for it. The Lower Court, however, and the Court of Appeals held that the Portal-to-Portal Act did not apply because of the fact that the activities were not preliminary or postliminary in character.

The Eighth Circuit itself had used these words in discussing a claim for lunch period in the case of *United States Cartridge Company v. Powell,* 185 Fed. (2d) 67. In that case, which was brought under the Fair Labor Standards Act, the Court of Appeals used this language—

> "Since the time claimed before the beginning of the regular shifts and the 30 minute lunch periods

are of the character which the Portal-to-Portal Act requires that there should be a contract expressly providing compensation for, or a custom or practice consistent with an intention that there be compensation for such time, and not inconsistent with an existing contract, before compensation may be recovered for such time, a formal compliance with the Act would require that the conditions precedent to recovery specified in the Act, be pleaded."

The opinion of the Court in the case at bar is now to the effect that in a suit brought under Section 16 of the Fair Labor Standards Act to recover for compensation under that Act, the Portal-to-Portal Act of 1947 does not apply, unless the activities were preliminary or postliminary in character, and the Court has held that for claimed activities during lunch period which were, according to the opinion, more or less standby activities, a recovery could be had under the Fair Labor Standards Act, and that the Portal-to-Portal Act does not apply even though the activities were prior to the passage of the Portal-to-Portal Act in May, 1947.

We believe the weight of authority in the country is to the contrary; other circuits have held to the contrary and we further believe that this Court has never specifically passed upon the matter.

We cite in support of this contention the following cases:

Battaglia, et al., v. General Motors Corp. (C. C. A. 2d Cir.), 169 Fed. (2d) 254. Suits were brought in the District Court for the Western District of New York by and in behalf of the defendant's employees to recover overtime pay in accordance with the provisions of the

Fair Labor Standards Act of 1938. While these suits were pending without adjudication, Congress enacted the Portal-to-Portal Act of 1947 (29 U. S. C. A. 251-262). The Lower Court entered an order sustaining defendant's Motion to Dismiss the Complaint. *One of the basis for the claim was time spent in lunch periods and rest periods during which their time was not entirely at the disposal of the employees.* The Court said it was not alleged that the compensation sought was for activities which were compensable by an express provision of a written or non-written contract or by a custom or practice in effect at the time of activities or at the place of employment. Consequently, the appellants did not meet the condition of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act on showing the employer's liability under the Fair Labor Standards Act, nor did they comply with the jurisdictional requirements of sub-division (d) of that Section of the Act.

In this case it will be noted that a recovery was sought under the Fair Labor Standards Act on account of activities claimed to have been performed during the lunch period, and during the rest periods. The Court squarely held that to recover under such Act for such activities during the periods involved it was necessary to plead a contract or custom within the meaning of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947.

The case of *Boerkoel v. Hayes Manufacturing Company,* District Court, Western Division, Michigan, 76 Fed. Supp. 771, involved a suit to recover unpaid overtime compensation and liquidated damages and attorney fees under Section 16 of the Fair Labor Standards Act of

1938. The defendant's Motion to Dismiss was sustained, this because there was no pleading of a contract or custom within the meaning of Section 2 of the Portal-to-Portal Act of 1947. The Court in the opinion says:

> "Plaintiff contends that section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee's day. It should be noted that section 4 of the Act deals only with future claims for so-called portal-to-portal activities. In determining that section 2 of the Act is not limited to strictly portal-to-portal activities, the court said in Seese v. Bethlehem Steel Co., supra, 74 F. Supp. 416:
>
> "'When we look at the wording and structure of the Portal Act we find that it was clearly intended to define what activities claimed to create a liability for overtime work were made compensable. Thus the language reads—(see Section 2 (a) hereinbefore quoted). * * * It will be noted that the act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for nonpayment of minimum wages or overtime compensation. None are to be compensable "except an activity which was compensable by either—" contract, custom or practice. Furthermore, while the language includes the word "except," it seems entirely clear from the whole wording that the exception is the only activity which is compensable.'"

In the case of *Welsh v. W. J. Dillner Transfer Co.* (D. C., W. D., Pa.), 91 F. Supp. 685, plaintiffs brought suit to recover, claiming that they were entitled to over-

time compensation under the Fair Labor Standards Act for work in excess of 40 hours per week within the meaning of Section 7 of that Act. The defendant contended that it was subject to the provisions of the Interstate Commerce Act, and that 48 hours was the proper basis. The defendant further claimed that the Complaint should be dismissed because it did not contain any averment that the overtime compensation claimed was for an activity engaged in which was compensable either by custom or practice as provided in Section 2 of the Portal-to-Portal Act of 1947. The Court held that the Portal-to-Portal Act of 1947 was actually an amendment to the Fair Labor Standards Act, an must be read as a part of it. The Court held that insofar as an action sought to enforce liability under the Fair Labor Standards Act for activities engaged in prior to May 14, 1947, the fact that such activity was compensable by contract, custom or practice was jurisdictional. Plaintiffs urged that the Portal-to-Portal Act had no application to the case at bar; that that Act covered cases where claims were made based on time spent either preliminary to work or subsequent to actual working time. Plaintiffs urged that the requirement of an allegation of an expressed contract or custom was not intended to destroy claims for time actually devoted to normal work. The Court said—

> "Plaintiffs have substantial authority for their position, Central Missouri Tel. Co. v. Conwell, 8 Cir., 170 F. 2d 641. On the other hand, the weight of authority appears to be that Section 2 of the Portal-to-Portal Act applies to all claims for overtime."

The Court called attention in footnote 9 to the distinction between the phraseology in Section 2, which covers any activity of an employee and that of Section 4 which

spells out in so many words the type of activity which gave rise to the Portal-to-Portal legislation.

The Court called attention to the case of *Seese v. Bethlehem Steel Co.* (D. C., Md.), 74 Fed. Supp. 412 (affirmed 168 Fed. (2d) 58, in which Judge Chesnut held, speaking of the Portal-to-Portal Act, and speaking of Section 2 of Part II of that Act—

> "* * * the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation. None are to be compensable 'except an activity which was compensable by either—' contract, custom or practice."

The case of *Welsh v. Dillner,* supra, is again referred to in the case of *Love vs. United States Rubber Company* (D. C., Pa.), 92 Fed. Supp. 174.

In this last mentioned case there was a suit brought against the defendant for overtime compensation, liquidated damages and attorney fees under the Fair Labor Standards Act of 1938, as amended. It appears that during World War II the defendant operated ordnance works under a cost-plus-a-fixed-fee contract with the United States Government. Plaintiff and 25 others were engaged as firefighters to protect the plant and equipment. The time involved in the case was the period of sleeping time involved in the operation of a two platoon system. Under this two platoon system the men were required to be present on the premises three days per week for a twenty-four hour period each day, the first sixteen hours being considered working time, the remaining eight hours as sleeping time. They were paid straight

time for 40 hours, time and one-half for eight additional hours. They were not paid for sleeping time except when on rare occasions in an emergency they were called upon to work for brief periods, in which event they were paid time and one-half for the extra time actually worked. The Court stated that the question involved was whether during sleeping time the plaintiffs were engaged in any activity compensable by contract, oral or written, or by custom or practice, this as required by Section 2 (a) (1, 2) of the Portal-to-Portal Act of 1947.

The Court held that the Complaint in question did not meet the jurisdictional requirements as to contract, custom and practice, citing *Battaglia vs. General Motors Corporation.*, 2d Cir., 1948, 169 Fed. (2d) 254. In this case a summary judgment in favor of the defendant was ordered. In this case the men, while sleeping or during the sleeping hour, were confined to the premises, and could be called in case of an emergency.

In the case of *Tipton v. Bearl Sprott Co.* (U. S. C. A., Ninth Circuit), 175 Fed. (2d) 432, there was a suit brought under the Fair Labor Standard's Act to recover overtime compensation. Part of the employees were employed in a cafeteria. The Court states that the suit was instituted—

> "* * * to enforce the alleged liability of appellees under the Fair Labor Standards Act of 1938 for and on account of their alleged activities of appellants engaged in prior to May 14, 1947. The third amended complaint did not allege that such activities were compensable by an express provision of a written or nonwritten contract * * *."

The Court then said—

> "Thus the third amended complaint failed to state a claim of which the District Court had jurisdiction. It should have been dismissed on that ground."

The Court in a footnote cites the case of *Battaglia v. General Motors Corp.*, 2 Cir., 169 Fed. (2d) 254, and *Seese v. Bethlehem Steel Corp.*, 4 Cir., 168 Fed. (2d) 58.

In the case of *Redwitz vs. Ford Motor Co.* (U. S. D. C., Western District of Kentucky), 80 Fed. Supp. 265, an action was instituted by 1500 plaintiffs, formerly employees of the defendant, to recover overtime compensation and so forth under the Fair Labor Standards Act. The amount claimed was some $1,887,500. It was alleged that the defendant violated the Act in the following particular:

> "(4) Requiring plaintiffs to engage in work during their scheduled lunch and rest periods."

Plaintiffs alleged that they were employed by the defendant in carrying out a contract with the United States Government, for the production of certain goods. Plaintiffs alleged that under the contract with the Government, the defendant agreed to pay time and one-half for overtime work under the Fair Labor Standards Act. Defendant filed a Motion to Dismiss. The Court sustained the defendant's Motion to Dismiss.

In 3 A. L. R. (2d) at page 1129, there is an annotation on the question of whether or not the application of sub-section (a) of Section 2 of Part II of the Portal-to-Portal Act of 1947 was limited to portal-to-portal activities as such. Starting on page 1129 the annotation lists the cases holding that the cited section refers to all ac-

tivities and that no recovery can be had under the Fair Labor Standards Act, absent contract or custom to pay. The annotator cites the cases holding both ways. We take the liberty of quoting—

> "* * * Direct holdings or statements to this effect were made where—
>
> "—the court held that § 2 denied liability except for an activity which was compensable by either contract, custom, or practice, that the act in this respect was not limited to portal-to-portal activities as such but defined the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation, none of which were to be compensable 'except an activity which was compensable by either' contract, custom, or practice, and that furthermore while the language included the word 'except,' it seemed entirely clear from the whole wording that the exception was the only activity which was compensable. Seese v. Bethlehem Steel Co. (1947; DC Md), 74 F. Supp. 412 (affd (1948; CCA 4th), 168 F. 2d 58).
>
> "—the court stated that § 2 is not limited to strictly portal-to-portal activities but defines the essential characteristics of any alleged liability for nonpayment of minimum wages or overtime compensation, none of which are to be compensable except an activity which was compensable by either contract, custom, or practice, and, rejecting the contention that § 2 was not applicable since the suit was not based on strictly portal-to-portal activities, held that this contention ignored the plain wording of that section, which covers all activities and claims arising prior to passage of the act and determines the compensability of all activities during an employee's day. Boerkoel v. Hayes Mfg. Corp. (1948; DC Mich), 76 F. Supp. 771.
>
> "—the court disposed unfavorably of plaintiff's contention that the instant case was distinguishable

from the vast majority of portal-to-portal cases because it was not for so-called portal-to-portal activities, and pointed out that it had been held by some of the district courts that the act applied to all suits under the 1938 Act unless the case was brought within the exceptional provisions of § 2 relating to contract, custom, or practice. Shaievitz v. Lake (1948; F DC NY), 80 F. Supp. 241.

"—the court, disposing adversely of plaintiffs' contention that their case was not a 'portal' action because they had performed guard duty on the way to their regular posts, such as checking for violations of fire regulations and stopping employees for not having identification badges, stated that the act applied to all actions under the Fair Labor Standards Act, and that the issue therefore, whether or not a particular action was a 'portal' action, was whether the overtime sued for was for an activity compensable by contract, custom, or practice. Bauler v. Pressed Steel Car Co. (1948; F. DC Ill), 81 F. Supp. 172, 182 F. (2d) 357.

"—the court, referring to § 2, stated that there is nothing ambiguous about this provision, the meaning of which is explicit and plain, and that consequently recovery could not be allowed for activities covered by 'showup' time of certain firemen where there was nothing to show that the activities covered by that time were made compensable either by an express provision of a written or oral contract or by custom or practice. McLaughlin v. Todd & Brown (1948; F DC Ind), CCH Lab Cas Para 64606.

"—the court stated that the language of § 2 was clear and unambiguous and that just two essentials for compensability were stated—an express provision of a contract, or a custom or practice; that these were the requisites of both § 2(a), subsections (1) and (2), and of § 2(b); that everything else was eliminated; that although the kinds of activities were not designated or delimited, to be compensable or

within the jurisdiction of the court, the requirements of § 2(a) and § 2(b) had to be met; and that hence, even if the activity was 'work done within the work day proper,' in order to be compensable it had to be 'under such contract provision or such custom or practice.' Kemp v. Day & Zimmerman (1948), —— Iowa ——, 33 N. W. (2d) 569."

A later annotation appears in 21 A. L. R. (2d), page 1337. Again the annotator briefs the cases under the two subheads—*"View that act* (Portal-to-Portal Act) *does not apply to regular activities of job"* and *"View that act bars all overtime claims regardless of nature."*

In the opinion, in the case at bar, the District Judge said on page 674, 97 Fed. Supp.:

"* * * Though there is some authority to the contrary in other circuits, the view adopted in our own circuit seems to be in accordance with that suggested by counsel for the plaintiffs. In Central Missouri Telephone Company v. Conwell, 8 Cir., 1948, 170 F. 2d 641, 645, Judge Gardner, speaking for an unanimous court, announced:

" 'In the instant case there is no claim seeking to recover for time consumed in walking to work or other activities either before or after the normal working hours. Here the claim is that these employees actually worked many hours in excess of the forty hours permitted by the Fair Labor Standards Act, not for activities of a Portal-to-Portal nature, such as were involved in Anderson v. Mt. Clemens Pottery Company, supra (328 U. S. 680, 66 S. Ct. 1187, 90 L. Ed. 1515), and we agree with the trial court that it was not the purpose of the Portal Act to destroy such claims.' "

It thus appears that Judge Donohoe was of the opinion that a conflict existed as between the various circuits in the matter involved.

We are conscious of the fact that briefs in support of Petition for Certiorari should be as brief as possible. Still we believe it would be of benefit to the Court to have available the opinion of the Court in the case of *Cobb v. Aluminum Co. of America*, 226 S. W. (2d) 110. The opinion is in the Kansas City Court of Appeals. The case involved a suit under the Fair Labor Standards Act for overtime. The suit also involved a prayer for liquidated damages and attorney fees. The defendant operated a plant in Kansas City, Missouri, wherein it manufactured cylinder heads for aircraft. The plaintiffs were employees at this plant and their employment terminated upon the discontinuance of production in June, 1945. The suit was brought on January 11, 1947. Plaintiffs sought to recover for themselves and others, similarly situated, overtime wages alleged to be due them under the Fair Labor Standards Act, 29 United States Code Annotated, Section 201, et seq.

The Trial Court had dismissed the petition. The action of the Trial Court was affirmed. Judge Broaddus, in analyzing the question we are discussing, said as we shall quote. In this quotation he analyzes the cases of the country holding the rule to be as we are claiming, and then analyzes the cases holding to the contrary. The quotation is as follows—

> "Plaintiffs claim that the motion to dismiss should not have been sustained because their petition seeks to recover for uncompensated overtime not confined to portal-to-portal activities. On page 10 of their brief they say: 'The petition seeks to recover for uncompensated overtime not only for portal-to-portal activities but also for work and labor actually rendered which does not fall within the condemnation of the Portal-to-Portal Act.' This is a misconception

of the effect of the amendments to the Fair Labor Standards Act resulting from the Portal-to-Portal Act. Part 2 of the latter act says: 'No employer shall be subject to any liability * * * on account of the failure of such employer *to pay an employee minimum wages, or to pay an employee overtime compensation,* for or on account of any activity of an employee engaged in prior to the date of the enactment of this Act' except by contract, custom or practice. (Italics ours.) This language is clear. As said in the well-considered opinion in the Seese case, supra: 'It will be noted that the Act in this respect is not limited to portal-to-portal activities as such but defines the essential characteristics of any alleged liability for non-payment of minimum wages or overtime compensation. *None* are to be compensable 'except an activity which was compensable by either—' contract, custom or practice. (Italics theirs.)

"In Kemp v. Day & Zimmerman, Inc., supra, plaintiffs made the same claim as is made here that the Portal-to-Portal Act did not prevent a recovery because the overtime involved was not spent in typical portal-to-portal activities. In rejecting the plaintiffs' contention, and in sustaining the dismissal the court said, 33 N. W. 2d loc. cit. 590, 591: 'Plaintiffs contended in oral and printed arguments that the overtime involved was not spent in typical 'portal-to-portal' activities—just before starting time and after quitting time—but was during 'the period from whistle to whistle'. Such period would appear to be 'regular time'. After referring to the statute the court says: 'It is clear and unambiguous. Just two essentials for compensibility are stated—an express provision of a contract, or a custom or practice. They are the requisites of both section 2(a), subsections (1) and (2), and of Section 2 (b). *Everything else is eliminated. The kinds of activities are not designated or delimited.* But to be compensable or within the jurisdiction of the court, the requirements of section (a) and (b) must be met. Even if the activity

be 'work done within the workday proper', as plaintiffs assert was the case, it must be 'under such contract provision or such custom or practice.' It is so stated in section 2(b).' (Italics ours.)

"In Sinclair v. United States Gypsum Co., D. C., 81 F. Supp. 365, loc. cit. 366, it is said: 'Plaintiffs' attorney, however, insists that their alleged overtime work was not preliminary or postliminary but was an integral part of the principal activities * * *'. Rejecting this the court said: 'Plaintiffs cannot recover for alleged overtime work unless they allege and prove that this work was compensable under some effective 'written or nonwritten contract' or 'a custom or practice in effect, at the time of such activity.'' Citing cases.

"In Boerkoel v. Hayes Mfg. Co., D. C., 76 F. Supp. 771, loc. cit. 775, it is said: 'Plaintiff contends that section 2 of the Portal-to-Portal Act is not applicable because his suit is not based on strictly portal-to-portal activities, that is, activities preliminary or postliminary to his principal activities. However, this contention ignores the plain wording of that section, which covers all activities and claims arising prior to the passage of the Act and determines the compensability of all activities during an employee's day.'

"In Shaievitz v. Laks et al., D. C., 80 F. Supp. 241, loc. cit. 243, it is said: 'Plaintiff urges two reasons for distinguishing this case from the vast majority of decisions. He asserts that the present action is not for so-called portal-to-portal activities. Most of the thirty-odd opinions on this question carefully point out that the suits under consideration therein concern such activities. * * * It would appear, however, that the amending Act does apply to all suits under the 1938 Act.'

"In Amelbo et al v. Pennsylvania Salt Mfg. Co., D. C., 83 F. Supp. 456 it is said, that 'the weight of

authority would seem to be that the Portal-to-Portal Act applies to all claims for overtime.'

"Plaintiffs have cited the cases of Twigg v. Yale & Towne Mfg. Co., D. C. N. Y., 7 F. R. D. 488, and Deaton v. Titusville Bldg. Corp., D. C. N. Y., 72 F. Supp. 986, in support of their contention that the motion to dismiss should not have been sustained. These two decisions have since been overruled in New York and have not been followed elsewhere. See Borucki v. Continental Baking Co., D. C., 74 F. Supp. 815; Shaievitz v. Laks et al., 80 F. Supp. loc. cit. 242. Plaintiffs also cite the decision of Conwell v. Central Missouri Telephone Co., D. C., 74 F. Supp. 542, 545. In that case, however, the suit did not involve additional activities, but plaintiffs had put in more hours in doing their work as telephone operators than they had been paid for. The opinion quotes the language of Senator Ferguson, a member of the Judiciary Committee, who actively participated in the preparation and passage of the Portal-to-Portal Act as follows: 'I answer by saying that it is the intent of the section referred to abolish every known claim that could exist under the fair Labor Standards Act (29 U. S. C. A. § 201 et seq.) the Walsh-Healey Act (41 U. S. C. A. § 35 et seq.) or the Bacon-Davis Act (40 U. S. C. A. § 276a et seq.)—specifically under the acts, except claims which may arise under any express or implied contract. It wipes out all claims that are specifically provided for in the acts referred to. I think it was the intention of the drafters of the legislation to wipe out everything under those acts that was not based upon contract or custom or practice. *That was the intention.*' " (Italics ours.)

"It then says: 'This statement seems to agree with the statements of most other Senators who discussed the matter.' The effect of the holding in that case is that the allegations of the petition there considered, implied, if not clearly expressed, an agree-

ment to pay and were sufficient under the Portal-to-Portal Act."

We, therefore, submit to the Court that the opinion in the case at bar of the Court of Appeals is in conflict with the decisions of other courts of appeals on the question we are discussing. This is an important conflict, making it necessary, in our opinion, for this Court to assume jurisdiction of the case and to finally decide the question.

Reason Number 2 Relied Upon for Granting Writ of Certiorari. The Reason Is as Follows:

"The Court Below Decided Important Questions of Federal Law, i. e., an Interpretation of the Fair Labor Standards Act of 1938 and an Interpretation of the Portal-to-Portal Act of 1947 with Reference Thereto Which Have Not Been But Should Be Settled by This Court."

The District Court held as a matter of law that during the lunch periods the employees were engaged in the principal activity of the work-week—

> "and were not merely taking care of preliminary or postliminary matters. This being so, the court has concluded that Section 2 of the Portal Act is inapplicable to this case and that the plaintiffs are not required to plead and prove a contract, custom or practice to compensate them for the hours worked during the lunch period." (Pages 8 and 9 of the Opinion, Court of Appeals.)

The Court of Appeals affirmed this rule laid down by the District Court. The Court of Appeals after stating that the guards were obliged to prevent disturbances by their presence and vigilance, and the firemen were likewise obligated to be constantly vigilant to prevent fires, then said—

"* * * yet both the guards and the firemen served to a considerable extent in a standby capacity."

The evidence shows that there was only one emergency during the period involved, and that was when a plane crashed through a roof of one of the buildings.

The evidence shows that the firemen, as has been said before, were allowed a thirty minute lunch period and it was only on the very rarest occasions that their lunch was ever interrupted, and if it was interrupted they came back and had their lunch at a later period. The firemen that were on inspection had the same privilege as the guards as to their lunch.

We submit that this Court should decide that subsection (a) of Section 2, Part II of the Portal-to-Portal Act of 1947 where it uses the words—

"No employer shall be subject to any liability * * * under the Fair Labor Standards Act of 1938 as amended * * * on account of the failure of such employer to pay an employee minimum wages, or to pay an employee overtime compensation, for or on account of *any* activity of an employee engaged in prior to the date of the enactment of this Act, except an activity which was compensable by either"—

(1) Contract,

(2) Custom.

means any activity including alleged activities during the 30 minute lunch period involved.

The Court will remember that Part II of the Portal-to-Portal Act of 1947, above mentioned, applies to existing claims, that is, for work done before the passage of the Portal-to-Portal Act of 1947. The period involved in

the case at bar was from March, 1943, to September, 1944. *Section 4 of Part III of the Act has to do with future claims,* and has to do with claims for activities occurring after the enactment of the Portal-to-Portal Act. This Section, Section 4, describes the activities as walking, riding or traveling, and so forth, to work, and activities which are preliminary to or postliminary to said principal activity or activties. As has been stated in the opinions in the cases cited above under Reason 2, Part II applies to *any* activities, and we submit that this Court should so finally determine the meaning of Sub-section a), Section 2 and Sub-section (d), Section 2 of Part II of the Portal-to-Portal Act of 1947.

On March 6, 1943, when the new bulletin was issued allowing to the plaintiffs the thirty minute lunch period without pay, the employees knew this to be a fact.

What was the effect of the employees continuing to work after the issuance of the bulletin of March 6, 1943, and after the promulgation of the thirty-minute lunch period without pay?

In the case of *Williams v. Jacksonville Terminal Co.,* 1942, 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914, the Court was concerned with the question of whether or not tips received by redcaps could be considered in determining whether red caps were paid the minimum wage. The Court in the opinion says:

> "'This employment of the redcaps was at will and subject to the employers' conclusions as to the desirability of continuing their employment. * * *'
>
> "'With the effective date of the Act the employers became bound to pay a minimum wage to

their employees, the redcaps. Accordingly the latter were notified that future earnings from tips must be accounted for and considered as wages. Although continuously protesting the authority of the railroads to take over the tips, the redcaps remained at work subject to the requirement. Such protests were unavailing against the employers. Although the new plan was not satisfactory to the redcaps, the notice transferred to the railroads' credit so much of the tips as it affected. *By continuing to work, a new contract was created.* (Emphasis supplied.)

"'In Shepler v. Crucible Fuel Co., 3 Cir., 1944, 140 F. 2d 371, 374, the Court cited the 'redcap case', stating, '* * * the Court held, we think broadly and unequivocally, that continuance in an employment under a new method of computing pay creates a new contract and that the employee's consent to the new arrangement may be found from the continuance, notwithstanding repeated protests on his part.'"

The Court of Appeals in its opinion said—

"The case at bar falls in the class with the Central Missouri Telephone Company case as the Trial Court correctly concluded."

And, this we believe both the Lower Court and the Court of Appeals came to an erroneous conclusion. We do not believe that the legal conclusion to the effect that the Portal-to-Portal Act of 1947 was not applicable announced in the Central Missouri Telephone Company case was correct. We think it is contrary to the majority opinion in the country as announced in the various Courts of Appeals and District Courts. Assuming that the cited case announced the proper conclusion in that case, we believe that the Court of Appeals erred in coming to the conclusion that the case at bar fell in the class of that case. In the cited case, the employees, i. e., two in num-

ber, were on duty from nine in the evening until eight in the morning as telephone operators, and were paid for eight hours until the year 1943. In 1943 an increase in pay was requested, and an additional amount of pay was allowed by reducing the sleeping time. Thereafter Mrs. Conwell was paid for nine hours and Miss Pinkepank was paid for eight and one-half hours. The switchboards were located in buildings controlled by the defendant. The employees were not allowed to leave the rooms in which the switchboards were. Cots were placed near the switchboards to enable them to sleep at times, but these women were constantly on duty actually answering phone calls both local and long distance. There was no question of lunch period allowed in this cited case. The Court held that the allegations of the petition there considered, implied, if not clearly expressed, an agreement to pay and were sufficient under the Portal-to-Portal Act. The cited case is not a case where there was a lunch period specifically allowed and set apart. In the case at bar the only question involved is activities during the lunch period. We cannot understand how the Central Missouri Telephone Company case could be decisive of the case at bar or at all controlling, and yet it controlled the decision of both the Lower Court and the Court of Appeals.

In the case at bar, as we have said so many times, the guards knew that there was a lunch period set apart for them. They alleged so in their Complaint

In the Complaint it is alleged (see Printed Record, page 4)—

> "that between the dates of March sixth, 1943, and September sixteenth, 1944, said guards were permitted to leave their posts for a period of thirty minutes

each day to enable them to walk to the cafeteria to secure food * * *."

It was the claim *in the Complaint* that the guards were required on their way to the cafeteria and while at the cafeteria to check for badges and it was the claim that they were subject to call for an emergency. This was the basis set forth in the Complaint for the claim of overtime wages for the thirty minute lunch period.

As to the firemen, it was alleged that during the same period, they were permitted to go to the cafeteria to secure food, bring the same back to their station and to eat it. It was alleged that they were required to be on the alert for fire duty and were required to be on duty for said thirty-minute lunch period (Printed Record, page 6). This being the nature of the claim as set forth in the Complaint and the various amendments thereto, we submit that the case is brought within the case of *Battaglia v. General Motors Corp.*, 169 Fed. (2d) 254 (2d Cir.).

In the case of *Bauler v. Pressed Steel Car Co., Inc*, (7th Cir.), 182 Fed. (2) 357, 81 Fed. Supp. 172, the suit was by guards, and was one for overtime compensation under the Fair Labor Standards Act. The employees claimed they performed their regular duties because on their way to their regular posts they checked for violations of fire regulations and stopping employees not having identification badges. There is an opinion in this case in the Lower Court in 81 Fed. Supp. 172. In that opinion, Judge Campbell said—

"But the Portal-to-Portal Act applies to all actions under the Fair Labor Standards Act. The issues therefore, whether or not this is a 'portal' ac-

tion, is whether the overtime sued for here is for an activity compensable by contract, custom or practice."

Reason Number 3 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

"The Court of Appeals Decided a Federal Question of Law in Conflict with the Applicable Decision of This Court."

We refer to the cases of *Armour and Company v. Wantock,* 323 U. S. 126, 65 S. Ct. 165, and *Skidmore vs. Swift and Company,* 323 U. S. 134, 65 S. Ct. 161, and *Williams v. Jacksonville Terminal Co.,* 315 U. S. 386, 62 S. Ct. 659, 86 L. Ed. 914. We have heretofore discussed the last mentioned case.

We wish to discuss the *Armour and Company v. Wantock* case and the *Skidmore vs. Swift and Company* case, mentioned above. It will be remembered that these cases involved claims by employees of packing houses, who, after their regular day's work stayed on in the fire halls. Their claim was that they should be paid for the time spent in the fire halls. These fire halls were on the packing house premises. They provided accommodations for their employees; that is, the employees slept in the halls and cooked meals in the halls. The employees claim that they should be paid for the entire time spent in the fire hall because they were on call and they were confined to the fire halls and could not leave the premises.

The Circuit Court of Appeals in the Swift case held for the defendant. In the Armour case the holding was in favor of the employees. The Swift case was reversed and the Armour case was affirmed. Mr. Justice Jackson in the opinion in the Armour case says—

> "But it (meaning the Lower Court) declines to go to either extreme demanded by the parties as to working time. Usual hours for sleep and *eating* it ruled would not be counted, but the remaining hours should."

The Court will note that the time set apart for sleeping and for eating was not to be paid for. These men, however, were in the fire halls and were on call. Surely there is nothing in the law that prohibits an employer from setting apart and allowing a thirty minute lunch period—not to be paid. There is nothing in the law which would set aside the implied agreement resulting as set forth in the case above cited, i. e., *Williams v. Jacksonville Terminal Co.*

We believe it to be the universal rule of law that employers may adopt what is known as the two-platoon system, that is, they may agree with their watchmen or employees that they remain on duty for twenty-four hours on alternate days, and that they be paid for sixteen hours, while they were on duty, that is, on the day they were on duty twenty-four hours. This is the case of *Rokey v. Day & Zimmerman*, 157 Fed. (2d) 734 (Eighth Circuit).

Reason Number 4 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

> **"The Court Below Affirmed a Finding of Fact of the Lower Court to the Effect That During the Lunch Periods Involved the Guards Were Engaged in the Principal Activity of the Work-Week and Were Not Merely Taking Care of Preliminary or Postliminary Matters, Which Said Finding of Fact Was Clearly Erroneous."**

The Lower Court in its Findings of Fact used the following language (Printed Record, page 61):

> "The system was essentially this: Every day the Company would post a bulletin assigning each guard to a particular post and assign someone to relieve each guard for lunch at a certain time. For the purpose of clarity a representative bulletin has been set forth in the margin. An examination of these bulletins shows that in many instances a guard would be directed to relieve himself; in other instances a guard would be required to relieve others; and in still other instances, 'Rovers' were assigned to relieve guards for lunch. 'Rovers' were guards whose only duty was to relieve other guards."

The undisputed record shows that the guards and the firemen knew that from March 6, 1943, until September 6, 1944, they were not to be paid for the thirty-minute lunch period. There were four plaintiffs in this case. One of the plaintiffs, Glen E. West, testified as follows (Record, page 143):

"Q. After March 6, 1943, you were permitted to go to lunch at the Cafeteria and permitted thirty minutes?

A. That was right.

Q. That was posted as a bulletin?

A. Yes.

Q. Of course, you weren't to be paid for that thirty minutes, you understood that.

A. That is right."

The Findings of the Lower Court which were affirmed by the Court of Appeals as to the activities of the guards and firemen were as follows (Record, pages 62 and 63):

"Though the instances where a guard was required to take affirmative action were not relatively great, the court cannot lose sight of the fact that the mere presence of a guard fully uniformed, anywhere in the plant area, was a deterrent to lawlessness and necessarily beneficial to the defendant"

* * *

"The evidence shows that at various times, some firemen in each of the three groups, were actually called upon to take affirmative action for the defendant's benefit during their lunch time. Though the instances in which such affirmative action was required are relatively few, it is nonetheless apparent that the firemen were required to be constantly vigilant and consequently, even during the lunch period, their time was not their own, but belonged to the company."

As has been said before, the Lower Court found (Record, page 64) that there was no contract within the meaning of the Portal-to-Portal Act to pay for this thirty-minute lunch period, and the Court did not find that there was any custom so to do (Record, pages 64, 65).

We call attention to Judge Riddick's dissenting opinion which sets forth the facts.

The Court will remember that in the Complaint filed by the plaintiffs they alleged that they were allowed a thirty-minute lunch period as hereinbefore set forth, but they claim that during that lunch period they performed certain duties and that their lunch period was interrupted and so forth.

Judge Riddick in speaking of the Findings of Fact made by the Lower Court stated—

"The evidence on which the court reached the conclusion stated in its opinion came from only twelve of the more than 250 plaintiffs. None who testified could remember a specific instance of a call to duty during his lunch period. All admitted that unless called to duty they had an uninterrupted thirty minutes for lunch. All admitted that if the lunch period was temporarily interrupted by a call to duty the employee could return to lunch at a later period. Only one witness testified that he was always on duty throughout the lunch period. His testimony was contradicted by the evidence on behalf of the defendant supported by defendant's timekeeping records.

"I am unable to find in the facts as found by the court substantial evidence for the inference that plaintiffs were engaged in compensable work during the thirty-minute lunch period allowed them."

Evidence Produced by Plaintiffs

We have heretofore quoted from the testimony of Glen E. West, one of the plaintiffs.

—Plaintiffs' Witness Wren L. Culkin

He testified as follows:

"On March 6th there was a change made in post time when we were allowed to go to the cafeteria. That was an order made by the Glenn L. Martin Company and was in a bulletin pasted on our bulletin board." (Record, page 119.)

He further testified—

"Q. I understand. We will get to the firemen, but under this order, guards were allowed, if they so desired, to go to the cafeteria for thirty minutes.

"A. Yes, sir."

—William A. Keefer

He was the second witness produced by the plaintiffs. His exact testimony is as follows:

"Q. Sometime later were you permitted to go to some Cafeteria for lunch?

"A. Yes, I think after March 6, 1943, we were permitted to be relieved by a Rover and to eat in the Cafeteria." (Record, page 124.)

• • •

"Q. Did you ever have occasion, as far as you know, when you were on your lunch hour—as a guard I am speaking of now—to put down any fight or misbehavior or anything of that kind?

"A. Nothing more than a badge infringement.

"Q. About all you had to do, you might notice some fellow that didn't have a badge?

"A. That's right, sir.

"Q. Do you ever actually remember of having one of those?

"A. Yes, I do, I remember faintly.

"Q. Did you ever turn in a report?

"A. Yes.

"Q. Was there more than one—do you remember more than one.

"A. No, I don't believe so.

• • •

"Q. Do you remember when you were a guard of ever being called when you were at lunch in the cafeteria?

"A. Called away from the cafeteria?

"Q. Yes.

"A. No, I can't remember of any instance." (Record, pages 127, 128.)

—Alex Feilmeyer

He was produced as a witness by the plaintiff. His exact testimony is as follows:

"Q. When you did go to a cafeteria to eat, did you have full half hour at any time?

"A. If you weren't called away, yes you would have your half hour." (Record, page 131.)

* * *

"Q. Then after this March 6, 1943, you were permitted to go to the Cafeteria?

"A. Yes.

"Q. And you would go, of course, to the Cafeteria that was nearest you out at Modification?

"A. Yes.

"Q. Did you use a bicycle to go there, or did you just walk?

"A. Walked.

"Q. Did what they call a Rover come around and relieve you?

"A. Yes."

* * *

"Q. When it came to lunch, you were again relieved by a Rover and went to the cafeteria?

"A. That is right.

"Q. And you were allowed thirty minutes for this lunch?

"A. Yes.

"Q. And these cafeterias were operated by the Glenn L. Martin Company?

"A. Yes.

"Q. And they aimed to operate them at a pretty reasonable price?

"A. Yes.

"Q. And they were pretty good places to eat, weren't they?

"A. It sure was." (Record, pages 132, 133, 134.)

—Lewis Allerton

He was called by the plaintiffs. His exact testimony is as follows:

> "After March 6, 1943, we were permitted to eat our lunch in the cafeteria. The company set the time when we were to eat and the Company had rovers to go around and relieve us from our posts so that we could go and eat. However, all the posts were not covered by rovers."
>
> * * *
>
> "Q. Were there many occasions when you were unable to eat your entire lunch?
>
> "A. Two or three times." (Record, page 135.)

—Angeline E. Way

She was called as a witness by the plaintiff. She testified as follows:

"Q. You knew after you came to work you were entitled to thirty minutes to go to lunch to a cafeteria?

"A. That is right."

* * *

"Q. And you had thirty minutes to eat your lunch?

"A. That is right.

"Q. You could go to your locker room during that thirty minutes?

"A. That is right.

"Q. And you could smoke down there and be at ease, if you wished?

"A. That is right, but the locker room was too far away.

"Q. If you wanted to you could sit in the Cafeteria the whole thirty minutes?

"A. That is right, if you weren't called.

"Q. Were you ever called during the time you were there from the Cafeteria?

"A. Yes.

"Q. How many times were you ever called?

"A. At least once or twice that I know of and that was to clear employees.

"Q. During all the time you were employed there, you were called out of the lunch period twice?

"A. That is right." (Record, pages 146, 147.)

—John Kerwin

He testified in part as follows:

"Q. You remember guards were allowed to eat at the Cafeteria after March 6, 1943?

"A. Yes, sir.

"Q. And were allowed 30 minutes for a lunch period?

"A. Yes, sir." (Record, page 150.)

—Carl A. Carsey

He was called by the plaintiffs and testified as follows:

"Q. We got past that, with effort—after March 6, 1943, you were allowed to go to the Cafeteria for thirty minutes, is that right?

"A. You mean my actual time was thirty minutes at the Cafeteria?

"Q. No, I mean by that directive, after March 6, 1943, you were allowed thirty minutes for lunch and were allowed to go to the Cafeteria.

"Q. That is right, Mr. Witness? Do you remember my question?

"A. That is right, from the post back to the post.

"Q. And you did go to the Cafeteria?

"A. I did, yes, sir." (Record, pages 151, 152.)

We submit that the Lower Court was clearly wrong in making any finding to the effect that during the lunch period these plaintiffs were employed at their regular activity. This finding of fact was clearly erroneous and the affirmance of that finding of fact by the Court of Aupeals was clearly erroneous. There is no testimony in the record that these plaintiffs were engaged in their usual activity or any other activity during the lunch period. On one or two occasions when the lunch period was interrupted, these guards could come back and have their lunch at a later period.

It will be noted that both courts make this finding of fact because the guards and firemen kept their uniforms on while eating at the cafeterias.

In the cases involving the two-platoon system and in the cases involving men in the fire halls of Armour and Company and Swift and Company, hereinbefore cited, the men were confined to the fire halls. They could not leave the fire halls, but the employer was allowed to enter into an agreement or to make a rule to the effect that the employees were not to be paid for eating or sleeping time. Even though the plaintiffs did wear their uniforms, and even though they did not leave the 700 acre plant area during the lunch period, they were allowed either to go to the cafeteria or to go to the smoking area or to the locker room or to be at ease. They knew that they were not to be paid for this thirty-minute lunch period and they continued to work from March 3, 1943, until September 17, 1944, under such an understood arrangement.

It was not until long after the war was over and long after the plant was closed that claim was made to the effect that these men were to be paid for this lunch period. The undisputed evidence discloses that during a greater part of the time involved there was a guard stationed at the door of the big cafeteria during the lunch period. The undisputed evidence discloses that any signal lights that were in the big cafeteria went on over the whole floor of the building at the same time and on this floor were a number of guards and rovers regularly assigned during the period involved. There were guards and rovers and officers on duty during the lunch periods allowed to other employees, who were patrolling the halls and so forth, and who would see any signal lights that

went on and would answer them. There would be no occasion for guards at lunch to be disturbed by the signal lights.

The undisputed evidence shows that these guards were allowed a full lunch period and could go to the cafeteria and eat their lunch therein.

The undisputed evidence further shows that rovers relieved them, if necessary, and that by daily bulletin the program of allowing a lunch period was put into effect and was carried out.

It is hard for us to see how a guard or fireman who was allowed a thirty minute lunch period who was relieved by a rover or who went to the cafeteria and had his lunch during a thirty minute lunch period and then returned to his post, or in case he desired to smoke went to the smoking area, can claim that he was carrying on his regular activities because of the fact that he had on his uniform and because of the fact that he might be called on an emergency if an emergency ever occurred.

We ask the Court not to forget that all of the employees were allowed a thirty-minute lunch period and that they left their machines, tools and so forth and went to those various cafeterias and had their lunch. They were not paid for this and never were paid for it.

We submit that this Court should hold that the Findings of Fact referred to above made by the Lower Court and affirmed by the Court of Appeals should be held to be clearly erroneous.

Reason Number 5 Relied Upon for Granting Writ of Certiorari. This Reason Is as Follows:

> **"The Court Below Affirmed a Finding of Fact of the Lower Court to the Effect That During the Lunch Periods Involved the Firemen Were Engaged in the Principal Activity of the Work-Week and Were Not Merely Taking Care of Preliminary or Postliminary Matters, Which Said Finding of Fact Was Clearly Erroneous."**

As we have said before, there were a limited number of firemen who were plaintiffs. The lunch period bulletin applied to firemen as well as to guards. Each morning there was a bulletin put up in the fire hall assigning the firemen to various stations, i. e., inspection in the various buildings, to the fire truck and three or four of them to the fire hall. These firemen left the fire hall and went out on inspection and when lunch came went to the various cafeterias just as did the guards. Two or three firemen assigned to the crash truck had a lunch period assigned to them. They came in at that lunch period. These firemen went to the cafeteria which was a few steps away, got their lunch and ate it at a table in the fire hall which was used for that purpose. The three or four firemen who were stationed at the fire hall, who were ready to drive the fire truck out in case of necessity, likewise at their lunch period went to the cafeteria, got their lunch, and ate it at the table provided for that purpose. They were all allowed a thirty minute lunch period and if a lunch period was interrupted by a fire, they got their lunch at a later period.

The evidence shows that during all of the lunch periods from March 6, 1943, to September 17, 1944, the

pumper was only called out 28 times during the three lunch periods. The period involved is over eighteen months. There were three shifts every twenty-four hours and three lunch periods every twenty-four hours. During the entire period the fire truck was not called out but only twenty-eight times during the lunch periods. The plaintiffs produced a witness, Reeder, who was the ambulance driver, and the exhibit or record shows that he was only called out during a lunch period from March 6, 1943, to September 16, 1944, on three occasions. The witness, Reeder, was the only one who testified in re ambulance calls. The record of these calls are Exhibit 98 (Printed Record, page 278), Exhibit 99 (Printed Record, page 280) and Exhibit 100 (Printed Record, page 281), and Exhibit 101 (Printed Record, page 101). The undisputed evidence shows that when their lunch periods were interrupted, as has been said before, they were allowed a thirty-minute lunch period later on in the day.

On page 183 of the Printed Record appears a photostatic copy of the Daily Report made by the Protection Department; page 200 of the Printed Record covers the guards. The fire report starts on page 202 of the Printed Record. This shows the nature of the daily reports. The daily assignments of the firemen to the various duties appear on pages 203, 204 and 208 of the Printed Record.

Reason Number 6 Relied Upon for Granting of Writ of Certiorari. This Reason Is as Follows:

> **"Under the Evidence the Court of Appeals Should Have Held That the District Court Erred in Not Applying the Rule of 'De Minimus Non Curat Lex.'"**

The evidence disclosed that on the very rarest of occasions either the guards or the firemen were called from

their lunch period. While the plaintiffs strained to get in evidence to this effect, the evidence discloses that on only one or two occasions during the period involved was the lunch period interrupted. Only twelve witnesses were called and only two or three of these witnesses could give any evidence of any interruptions of their lunch periods. The plaintiffs introduced no testimony as to the length of time spent on the interruptions or whether it was just answering a phone or whether it was leaving the cafeteria. The undisputed evidence is if they did leave they could have their lunch period at a later time. The number of the interruptions were so minimal as we believe to bring the case within the de minimus rule.

We believe the burden is upon the plaintiffs to prove the time it is claimed that each individual worked, and where that is not done, and no attempt is made to do it, and where the indefinite interruptions claimed are so very, very rare, then the de minimus rule, we believe, applies.

We call the Court's attention to the case of *Jax Beer Co. v. Redfern* (5th Cir.), 124 Fed. (2d) 172. Paragraphs 5 and 6 of the syllabus are as follows:

> "Evidence concerning number of hours worked and salary received by employees was insufficient to sustain judgment for employees for overtime compensation, liquidated damages and attorney's fees in action brought under the Fair Labor Standards Act of 1938. Fair Labor Standards Act 1938, §§ 1-19, and §16 (b), 29 U. S. C. A., §§ 201-219, and § 216(a).
>
> "The Circuit Court of Appeals would not uphold finding and judgment of lower court which tried case without jury, where, in order to do so, it would be necessary to base decision upon guess, speculation and averages made up for the uncertain recollections of plaintiffs."

CONCLUSION

Petitioner submits that the decision of the Court of Appeals sought to be reviewed is in conflict with the decisions of the Court of Appeals for the Second, Third, Fourth and Ninth Circuits;—this in its interpretation of the meaning of the Portal-to-Portal Act of 1947. It, likewise, is in conflict with those Circuits in holding the non-applicability of the Portal-to-Portal Act.

The point of conflict has as yet not been decided by this Court, and it is necessary that this Court assume jurisdiction because of such conflict; that the opinion likewise conflicts with the same Circuits in its interpretation of the Fair Labor Standards Act of 1938; that in addition thereto, the opinion of the Court decides a question of law involving the Fair Labor Standards Act of 1938 in conflict with the applicable decisions of this Court; that the Lower Court made erroneous findings of fact which were erroneously affirmed by the opinion of the Court; that under the evidence the Court of Appeals should have held that the District Court erred in not applying the rule of De Minimus Non Curat Lex. For these reasons, and the other reasons set forth in the Brief, the Petitioner respectfully prays for a Writ of Certiorari to the Court of Appeals for the Eighth Circuit to review the decision of that Court in this case.

Respectfully submitted,

J. A. C. Kennedy,
George L. DeLacy,
Leo Eisenstatt,
Omaha, Nebraska,
Donald Leach,
Columbus, Ohio,
Attorneys for Petitioner.